NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

MICHAEL WILLIAM JAMES, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11377 Trial Court No. 4FA-11-193 CR MEMORANDUM OPINION No. 6258 — December 16, 2015

Appeal from the Superior Court, Fourth Judicial District, Fairbanks, Michael P. McConahy, Judge.

Appearances: James M. Hackett, Law Office of James M. Hackett, Fairbanks, for the Appellant. Ann B. Black, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Hanley, District Court Judge.[*]

Judge ALLARD.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

Following a jury trial, Michael William James was convicted of two counts of first-degree sexual abuse of a minor[1] and twelve counts of second-degree sexual abuse of a minor[2] for sexually abusing his two daughters. He was sentenced to a composite term of 119 years with 80 years suspended (39 years to serve) and 15 years of probation.

James's primary argument on appeal is that his speedy trial rights under Alaska Criminal Rule 45 were violated. For the reasons explained here, we conclude that this claim has no merit and that the superior court properly denied James's various motions to dismiss his case under Criminal Rule 45.

James also contends that the superior court committed reversible error by (1) denying his motion to compel discovery from the State of archived APSIN[3] records and (2) denying his motion to suppress. We reject the first claim because we conclude that James failed to show that he directly requested that the superior court subpoena the APSIN records and also failed to show why he needed the actual records themselves. We affirm the superior court's ruling on James's motion to suppress for the reasons explained below.

James separately raises a cumulative error argument, asserting that the court erred in allowing the State to introduce the videotaped interviews of the children as "first complaint" evidence and further erred in refusing to give the jury a factual unanimity instruction. Although we agree with James that these rulings were error, we nevertheless

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[1] AS 11.41.434(a)(2).

[2] AS 11.41.436(a)(3).

[3] The Alaska Public Safety Information Network ("APSIN") is a state-run database used by Alaska Department of Public Safety employees and other law enforcement personnel to track a variety of information, including arrests, criminal histories, warrants, missing persons, and stolen property. *See* Division of Statewide Services, Alaska Department of Public Safety: Statewide Services, http://dps.alaska.gov/statewide// (describing APSIN).

conclude that these errors did not result in any prejudice to James given the way the case was argued at trial.

Lastly, James challenges his sentence as excessive, arguing that the superior court erred in failing to refer his case to the three-judge sentencing panel based on the non-statutory mitigators discussed in *Collins v. State*.[4] We affirm his sentence as not clearly mistaken.

Factual background and prior proceedings

In mid-May of 2010, ten-year-old A.J. gave her mother a letter saying that her father, Michael James, had been sexually abusing her. A.J.'s eight-year-old sister R.J. saw A.J. writing the letter and told A.J. that James had been sexually abusing her too. The mother moved into a shelter with her children, confronted James over the phone, and filed a police report. In response to his wife confronting him over the telephone, James sent her a number of incriminating texts apologizing for his conduct.

The children were interviewed by a forensic interviewer at Stevie's Place, a Fairbanks child advocacy center. During these interviews, A.J. and R.J. reported that James repeatedly touched their genitals, and A.J. reported that she once felt James's hand inside her.

Fairbanks Police Department Detective Christopher Nolan took over the investigation shortly after A.J.'s and R.J.'s interviews. Detective Nolan obtained a *Glass* warrant[5] and helped James's wife record several phone conversations with James, during

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[4] 287 P.3d 791 (Alaska App. 2012).

[5] As the supreme court held in *State v. Glass*, the Alaska Constitution requires that police obtain a warrant (commonly referred to since as a "*Glass* warrant") before they may surreptitiously record a conversation. *State v. Glass*, 583 P.2d 872 (Alaska 1978).

which James made incriminating statements admitting that he had sexually abused A.J. and R.J.

Detective Nolan entered a "locate" for James in APSIN, which alerted officers around the state that he wanted to speak with James. On the morning of October 29, 2010, two Anchorage police officers found James sleeping in his truck in the Eagle River Fred Meyer parking lot. The officers woke James and told him that a detective in Fairbanks would be calling him and that he should answer his cell phone.

Detective Nolan called, and James answered. During the thirty-two minute phone conversation that followed, James told Detective Nolan that he had touched his daughters sexually, specifically admitting that he had rubbed A.J.'s vagina beneath her underwear and touched her breasts. He said that he had touched A.J. "probably a dozen" times and touched R.J. three times at his residences off of Chena Hot Springs Road and on 22nd Avenue in Fairbanks. James denied ever penetrating his daughters. Near the end of the conversation, Detective Nolan asked James if either one of the Anchorage police officers was still there, and James said they were not.

A few days after this initial telephone conversation, James called and spoke to Detective Nolan a second time. He then drove to Fairbanks to speak to Nolan in person. After the in-person interview, James spoke to Detective Nolan on the phone again. In these recorded conversations, James again admitted to sexually abusing his children, specifically admitting during the in-person interview that his finger had once gone "between the lips" of A.J.'s vagina. He said that when this happened, he had "touched the hole and backed away" on A.J., but had not "go[ne] in her."

James was indicted on two counts of first-degree sexual abuse of a minor for sexually penetrating A.J.,[6] nine counts of second-degree sexual abuse of a minor for engaging in sexual contact with A.J., and three counts of second-degree sexual abuse of

[6] AS 11.41.434(a)(1).

a minor for engaging in sexual contact with R.J.[7] James was arrested on February 15, 2011, and arraigned the next day. The Alaska Public Defender Agency was appointed to represent him.

James's trial was continued a number of times for various reasons, including defense requests for continuance, witness unavailability, and court unavailability. James filed two pro se motions to dismiss his case for violation of his Rule 45 speedy trial rights; both were denied by the court. James also requested and received a representation hearing as well as additional opportunities to express his dissatisfaction with his attorney. The court evaluated James's complaints against his attorney, ultimately finding in each case that James was not entitled to appointment of different counsel.

On March 1, 2012, James requested that the Public Defender Agency be replaced with private counsel, James Hackett, whom James had retained. This request was granted by the court.

Following the substitution of counsel, James's new attorney filed a motion to compel discovery of various items that he claimed had not been disclosed. The State responded with affidavits explaining that many of these items had been previously disclosed to the defense. The State provided discovery of the remaining items, with the exception of James's request for the APSIN locate that Detective Nolan had entered for James. The State asserted that the locate no longer existed on the active computer system and that it therefore no longer qualified as evidence within the State's possession. The State asserted that the "historical" APSIN data was electronically stored by an entirely separate state agency and that the Department of Law would require a warrant from the court to access this historical data. The State supported its assertion that the data was no longer in its possession or control with affidavits from Detective Nolan and a paralegal.

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[7] AS 11.41.436(a)(2).

Superior Court Judge Michael P. McConahy denied James's motion to compel discovery.

James's attorney also filed a motion to suppress all of James's statements to Detective Nolan. He argued that (1) the initial statements were the product of an illegal seizure not based on a reasonable suspicion of "imminent public danger"[8]; (2) the initial statements were obtained in violation of *Miranda* and/or were involuntary; and (3) the remaining statements were all fruits of the initial illegally obtained statements from the first interview.

The superior court denied James's motion to suppress without an evidentiary hearing. The court ruled that, even assuming that the facts asserted by James were true, James had not shown that he was illegally seized or that he was in custody during the phone conversation with Detective Nolan. The superior court also ruled that James had not shown that he made his statements involuntarily. James moved for reconsideration, arguing that an evidentiary hearing was needed to resolve these issues. The superior court denied the motion for reconsideration, explaining that the original ruling had assumed the truth of all of James's alleged facts and that no evidentiary hearing was therefore necessary.

At James's trial, the defense expressly conceded James's guilt on all of the second-degree sexual abuse of a minor charges and challenged only the State's proof on the two counts of first-degree sexual abuse. During closing argument, the defense argued that James had never engaged in "knowing penetration" of A.J.

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[8] *See Coleman v. State*, 553 P.2d 40, 46 (Alaska 1976) (permitting temporary detention for questioning where the police have a "reasonable suspicion that imminent public danger exists or serious harm to persons or property has recently occurred").

The jury nevertheless convicted James of the two counts of first-degree sexual abuse involving A.J., as well as the twelve counts of second-degree sexual abuse of a minor involving both daughters.

At sentencing, James asserted two statutory mitigating factors: (1) AS 12.-55.155(d)(3) — that he sexually abused his daughters under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense; and (2) AS 12.55.155(d)(9) — that his conduct was among the least serious within the definition of the offense. James also requested that his case be referred to the three-judge panel based on manifest injustice and other non-statutory mitigating factors, such as the fact that he moved out of the family home before he was formally accused of the offenses, that he cooperated with Detective Nolan, and that he had no prior felony record.

The superior court rejected the proposed statutory mitigating factors and denied James's request for referral to the three-judge sentencing panel. The court then imposed 35 years with 10 years suspended on both of the first-degree sexual abuse of a minor counts, with all but 8 years of active imprisonment concurrent, and 10 years with 5 years suspended on each second-degree sexual abuse of a minor count, with all but 6 months of active imprisonment concurrent. All told, James received a composite sentence of 119 years with 80 years suspended (39 years to serve) and 15 years of probation.

This appeal followed.

The procedural facts relating to James's Rule 45 speedy trial claim and an overview of our analysis of this claim

Alaska Criminal Rule 45(c)(1) requires that a criminal defendant be brought to trial within 120 days from the date the defendant is served with the charging document, but Criminal Rule 45(d) exempts various types of delay from this 120-day calculation.

James was arraigned and served with the charging document on February 16, 2011. Thus, February 17 was Day 1 for Rule 45 calculation purposes.[9]

The Rule 45 clock ran for 76 days — until May 3, 2011 — when, at a scheduled calendar call, James's attorney requested and was granted a continuance until June 6, 2011, to allow her to review transcripts of audio recordings received in discovery. That request tolled the running of the speedy trial clock under Criminal Rule 45(d)(2).

The parties next convened on June 1, 2011, for a scheduled calendar call. James's attorney requested and was granted another continuance until August 2011, to allow her additional time to review the transcripts. The judge set a calendar call for July 27, 2011. This second defense-requested continuance again extended the tolling of the speedy trial clock under Criminal Rule 45(d)(2).

James asked to personally address the court at the June 1, 2011, calendar call, and after the judge consulted with James's attorney, who said she thought it inadvisable for James to speak, the judge told James to ask his attorney to set a separate hearing if he needed to address the court. James asked if he was allowed to speak, and the judge explained that although he was, the judge recommended that James consult with his attorney and ask her to set a separate hearing before speaking because anything James said could be used against him. James replied, "All right. Appreciate it."

At the July 27, 2011, calendar call, James's attorney informed the trial court that James wanted a representation hearing, and the trial court set a representation hearing for the following day, July 28, 2011. The speedy trial clock remained tolled under Criminal Rule 45(d)(2).

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[9] *See Crawford v. State*, 337 P.3d 4, 10 (Alaska App. 2014) (treating the day after the defendant was arraigned and served with the charging documents as Day 1 for Rule 45 calculations); *Davis v. State*, 133 P.3d 719, 722 (Alaska App. 2006) (also finding that the clock starts at Day 0, making the following day Day 1).

At the representation hearing, James voiced a number of grievances, including that his attorney had ignored his request for a bail hearing, that the State was not providing adequate discovery, that his attorney had lost discovered audio recordings, that he had been denied an opportunity to object to his attorney's June 1, 2011, continuance request, and that his case should be dismissed for violation of his right to a speedy trial under Criminal Rule 45.

The trial judge asked James exactly what he was asking for, and James said he wanted to move forward with his Rule 45 claim. The judge then asked James if he wanted to go to trial the following Monday, and James said no. Later in the representation hearing, the judge asked James three additional times if he wanted to go to trial on Monday, and James neglected to answer, repeating instead his claims that he was denied an opportunity to object to his attorney's June 1st continuance request and that the State was not providing adequate discovery.

James's attorney explained to the court that she had received all of the audio recordings she requested from the State, but that a few of the audio CDs had been temporarily misplaced after they were returned from the transcriber. She further explained that, although James had not yet received copies of the audio recording CDs, he had received transcripts of the recordings.

The trial judge asked James if he wanted to represent himself or proceed with a private attorney, rather than be represented by his court-appointed attorney. James said he was "not educated enough to fully represent [himself]" but said he would proceed on his own if he had to. The trial judge then inquired into James's understanding of how a court case proceeds, and after James said he had "no idea," the judge determined that James was not capable of representing himself.

The trial judge, prosecutor, and James's attorney then discussed possible dates for the trial, ultimately agreeing on October 31, 2011. Because this continuance

was granted with the agreement of the defense, the speedy trial clock remained tolled under Criminal Rule 45(d)(2).

On September 8, 2011, the State filed a motion to continue the trial until after January 1, 2012, because the victims' mother was expecting a baby in mid-November and would be unable to fly to Alaska for the scheduled October 31, 2011, trial. James's attorney did not oppose this motion because she agreed that the victims' mother was an essential witness and because James had asked the attorney to file a motion to suppress, which would have tolled the speedy trial clock anyway.

The trial judge granted the State's motion for a continuance on September 27, 2011, based on the unavailability of an essential witness and "in part" on James's non-opposition. The judge rescheduled James's trial for March 5, 2012, with a calendar call on February 29, 2012. The non-opposed State's continuance based on witness unavailability tolled the speedy trial clock under Criminal Rule 45(d)(3)(A).

Due to an administrative oversight, the October 19 calendar call (for the now-vacated October 31 trial date) was not cancelled. At that hearing, James (who was still represented by an attorney from the Public Defender Agency) made an oral pro se motion to dismiss his case for violation of his right to a speedy trial under Criminal Rule 45. James asserted that he had made it clear at the July 28th representation hearing that he did not want any additional continuances. He complained that he still had not received requested audio recordings, and that his attorney had still not filed the suppression motion he requested.

James's attorney defended her performance, explaining that she had not yet filed a suppression motion because the State had made an offer to resolve the case on the condition that James not file such a motion. She also reiterated that James had transcripts of the audio recordings he wanted.

The trial judge denied James's motion for dismissal under Rule 45, stating that as he had explained in his September 27 order, he believed there was good cause to continue the trial. The speedy trial clock therefore remained tolled under Criminal Rule 45(d)(3)(A) for witness unavailability. The trial judge also found that James's attorney had legitimate "tactical and strategic reasons" for not previously filing a motion to suppress and that appointment of different counsel was not justified.

The parties did not reconvene until the calendar call on February 29, 2012. At that hearing, James requested a representation hearing. The trial judge denied this request. James's attorney requested a status hearing the following day because of a scheduling concern.

At the status hearing, James asked the superior court to permit him to replace his court-appointed attorney with a private attorney, James Hackett. James also requested a two-week continuance to allow his new attorney to get up to speed on his case. The State did not oppose James's continuance request, and the superior court allowed Hackett to replace James's public defender, continuing the trial until April 9, 2012. Because James requested this continuance, the speedy trial clock remained tolled under Criminal Rule 45(d)(2).

James's new attorney filed a motion to dismiss the charges for violation of James's speedy trial and due process rights on March 9, 2012. The trial court denied this motion in a written order on March 28, 2012.

James's trial began shortly thereafter, on April 9, 2012. At that time, only 76 days had run on the speedy trial clock, and James was therefore brought to trial within 120 days of service of the charges against him as required by Criminal Rule 45.

James's objections to the foregoing speedy trial analysis

(a) The time attributable to James's attorney's request for a continuance on July 28, 2011

James argues that the trial court made insufficient or clearly erroneous findings to support its decision to toll the speedy trial clock from August 1, 2011, until October 31, 2011, based on James's attorney's July 28, 2011, request for a continuance. He also claims that he objected to his attorney's request for this continuance, and he argues that his personal consent, not just that of his attorney, was required to toll the speedy trial clock under Rule 45(d)(2).

Alaska Criminal Rule 45(d)(2) states that "[t]he period of delay resulting from an adjournment or continuance granted at the timely request or with the consent of the defendant and the defendant's counsel" shall not be included in computing the time for trial. This Court has not decided whether the use of "and" rather than "or" between "defendant" and "defendant's counsel" means that a defendant's personal consent to a continuance is required to toll the speedy trial clock under this provision, and we find that it is unnecessary to resolve that question here because the record shows that James did ultimately consent to the July 28, 2011, continuance.[10]

As previously mentioned, when the trial judge addressed James personally and asked if he wanted to go to trial on August 1, 2011, James said "no." And when the judge repeated the question three more times, James failed to answer. Thus, the record demonstrates that, notwithstanding James's complaints about his speedy trial rights, he did not want to go to trial on August 1, 2011. Accordingly, even assuming that James's

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[10] *See Baker v. State*, 110 P.3d 996, 999 (Alaska App. 2005) ("And we again conclude that it is unnecessary to decide whether [the defendant] needed to consent to the continuance to resolve the present case."); *State v. Jeske*, 823 P.2d 6, 8 n.1 (Alaska App. 1991) ("We find it unnecessary to decide [whether the defendant's consent is required under Criminal Rule 45(d)(2)]. We assume, for purposes of deciding this case, that Rule 45(d)(2) requires the defendant's consent to any continuance requested by defense counsel.").

personal consent to the continuance was required, he ultimately did consent to the continuance, and the speedy trial clock was properly tolled from August 1, 2011, to October 31, 2011, under Criminal Rule 45(d)(2).[11]

(b) The period attributable to witness unavailability from October 31, 2011 to January 1, 2012

James also argues on appeal that the trial judge's September 27, 2011, order granting the State's request for a continuance based on the unavailability of a material witness was invalid because it did not include a finding of due diligence on the part of the State in securing the witness's testimony. He also argues that the trial court should have found that the State did not exercised due diligence — that the State should have already known about the witness's pregnancy before it agreed to continue James's trial in July 2011.

Criminal Rule 45(d)(3)(A) excludes from speedy trial calculations periods of delay resulting from continuances "granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date[.]" Whether the State acted diligently in securing material evidence is determined based on "the reasonableness of the efforts actually

[11] *See Drake v. State*, 899 P.2d 1385, 1388 (Alaska App. 1995) (noting that a rule "that would allow an attorney to agree to postponement of the trial date, then return to court the next day and allege a violation of Rule 45 ... would give rise to an unacceptable potential for manipulation of the rule in a manner that thwarts the ends of justice") (internal quotation marks omitted).

made, not on the alternatives that might have been available."[12] Under this approach, we will find a lack of due diligence only where mere *pro forma* efforts have been made.[13]

We decline to find that contacting an out-of-state witness almost seven weeks before trial and learning of her pregnancy demonstrates a mere *pro forma* effort to secure the witness's testimony. The superior court could properly find that the State exercised due diligence, and the speedy trial clock was therefore tolled under Rule 45(d)(3)(A) through at least January 1, 2012, the date requested by the State in its motion to continue trial.

(c) The period from January 2, 2012, to February 29, 2012

For reasons apparently related to the superior court's other judicial assignments, James's trial was rescheduled for March 5, 2012, more than two months after the date requested by the State. (In his order denying the defendant's motion to dismiss for violation of his speedy trial and due process rights, the trial judge said that March 5, 2012 was the next available trial date, as the court was "unavailable during most of January due to Alaska Redistricting matters ... which takes precedence over 'all other matters' pursuant to Alaska Constitutional mandate.")

On appeal, James argues that this additional two-month delay separately violated his Rule 45 speedy trials rights. His argument presumes that his earlier objection to continuing the trial to January 1, 2012, also served as an objection to any further continuances beyond January 1, 2012. He therefore argues that, even if the State's requested continuance was properly granted, the speedy trial clock should not

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[12] *Ingram v. State*, 703 P.2d 415, 431 (Alaska App. 1985); *see also Findsen v. State*, 2001 WL 357153, at *3 (Alaska App. April 11, 2001) (unpublished) (applying the *Ingram* due diligence standard to efforts to obtain material testimony under Criminal Rule 45).

[13] *Ingram*, 703 P.2d at 431.

have been tolled during periods of delay related to the court's own scheduling conflicts. Thus, according to James, the speedy trial clock ran from January 2, 2012, until James requested a status hearing on February 29, 2012. If this period were added to the 76 days when the clock was tolled in May of 2011, then James's speedy trial clock would have run in mid-February 2012. James therefore argues that the trial judge erred in denying his March 9, 2012, motion to dismiss based on Rule 45.

We disagree, that James's general objection to the State's requested continuance qualified as an objection to the two additional months' delay apparently attributable to the court. This Court resolved a similar issue in *Wolfe v. State*, where the defendant filed an open-ended motion to continue trial "until after May 14."[14] We held that "by never indicating that he refused to consent to the new [later than May 14] trial date set by the court, Wolfe effectively consented to the [later] trial date."[15]

Although James (and not his attorney) did generally object to the State's request for a continuance, claiming that he "made it clear" at the July 28, 2011, representation hearing that he did not want further continuances, James made no arguments in his March 9, 2012, motion to dismiss specifically objecting to the additional two months' delay beyond what was requested by the State. Instead, James simply argued that his speedy trial rights had already been violated by the July continuance. We therefore conclude that James waived any objection to the trial judge's decision to continue the trial by two additional months.[16]

The speedy trial clock therefore stood at 76 days from January 2, 2012, until James requested a status hearing at the February 29, 2012, calendar call, after which

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[14] *Wolfe v. State*, 24 P.3d 1252, 1254 (Alaska App. 2001).

[15] *Id.*

[16] *See id.*

all additional delays were at James's request in order to allow his substitute counsel time to prepare. Accordingly, we affirm the superior court's denial of James's motion to dismiss his case for violation of his right to a speedy trial under Criminal Rule 45.

Why we conclude that any error in denying James's motion to compel discovery of historical data on the APSIN locate was harmless

James argues that the trial judge erred in denying his motion to compel discovery of the historical APSIN "locate" record. He claims that even if this record was not in the State's possession, the material still should have been discoverable under Alaska Criminal Rule 16(b)(7). He asserts that this rule requires courts to "issue suitable subpoenas or orders to cause material to be made available to defense counsel," and argues that the APSIN "locate" record was material because it tended to show that James was in custody when the Anchorage Police Officers contacted him in the Fred Meyer parking lot.

As a preliminary matter, James appears to have confused Criminal Rule 16(b)(5), which provides for the issuance of "subpoenas or orders" for discoverable materials, with Criminal Rule 16(b)(7), which allows a court, "in its discretion," to require disclosure to defense counsel of relevant material not covered under other provisions of Rule 16 upon a showing of materiality.

But regardless of which provision of Criminal Rule 16 James means to invoke on appeal, we conclude that James failed to establish that he was prejudiced by the trial court's failure to order discovery of the historical APSIN locate data. James provided no explanation to support his assertion that the APSIN locate contained information relevant to establishing whether James was in custody for *Miranda* purposes. And as the State points out, James never disputed the existence or the contents of the locate, which Detective Nolan described as merely advising other officers that he (Detective Nolan) wanted to speak to James. Given these facts, there are no grounds to

conclude that the historical locate record would have supported James's claim that his encounter with the Anchorage police officers amounted to custodial interrogation under *Miranda*. Accordingly, any error in the trial judge's decision not to order discovery of the historical locate record was harmless.[17]

Why we conclude that the trial court properly denied James's suppression motion

On appeal, James makes three arguments as to why the superior court should have granted his motion to suppress.

He argues first that the trial court erred in failing to recognize that he was subject to custodial interrogation in his first phone conversation with Detective Nolan, and that his statements should therefore have been suppressed because he was not given *Miranda* warnings.

As a general matter, a person is considered in custody for purposes of *Miranda* when the person is "physically deprived of his freedom of action" and if that deprivation of freedom is "of the degree associated with a formal arrest."[18] In deciding whether police questioning amounts to custodial interrogation, courts consider the totality of the circumstances, including "whether the defendant came to the place of questioning completely on his own, in response to a police request, or [if the defendant]

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[17] *See Braaten v. State*, 705 P.2d 1311, 1321 (Alaska App. 1987) (holding that denying the defendant discovery of a report was harmless error due to lack of prejudice and limited usefulness of the report).

[18] *Kalmakoff v. State*, 257 P.3d 108, 121 (Alaska App. 2011) (quoting *Hunter v. State*, 590 P.2d 888, 894-95 (Alaska 1979) and *State v. Smith*, 38 P.3d 1149, 1154 (Alaska 2002)) (internal quotation marks omitted).

was escorted by police officers."[19] Courts also consider intrinsic facts about the questioning, "such as when and where it occurred, how long it lasted, how many officers were present, what the officers and defendant said and did, whether there were physical restraints, drawn weapons, or guards stationed at the door, and whether the defendant was being questioned as a suspect or witness."[20] In addition, courts consider post-interrogation events such as whether "the defendant left freely, was detained, or was arrested"; however, "the post-interview event factor is of limited weight."[21]

Here, the record indicates that Anchorage police officers came to James, who was sleeping in his truck in a public parking lot, and informed him that a detective would be calling him from Fairbanks and that he should answer his phone. James remained in the truck when he answered the phone, and he was alone while he spoke to the detective. The Anchorage police officers did not participate in the telephone conversation, and their presence was so unobtrusive that James believed that they had left the area entirely. At the end of the phone call, James left of his own accord.

We agree with the superior court that, even viewing these facts in the light most favorable to James, James was not in custody for purposes of *Miranda* during his first phone call with Detective Nolan.

James's next argument is that his initial contact with the Anchorage police officers constituted an illegal seizure under the Fourth Amendment. A seizure under the Fourth Amendment occurs when the police, "by means of ... [a] show of authority ...

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[19] *Id.*

[20] *Id.*

[21] *Id.*

restrain[] the [defendant's] liberty" such that "a reasonable person, in view of the objective facts surrounding the incident, would believe that he is not free to leave."[22]

Here, we do not need to decide whether the initial contact with James constituted a seizure because the record demonstrates that any seizure was over before James made his incriminating statements to Detective Nolan. According to his affidavit, the officers returned his license "about four or five minutes into the telephone conversation with Detective Nolan." It was not until later (approximately nine minutes into the conversation) that Detective Nolan asked James if he had sexually touched his daughters and James replied "Yeah, I have." And, as previously noted, the Anchorage police officers did not participate in the telephone conversation, and their presence was so unobtrusive that James believed that they had left the area entirely.

Lastly, James argues that his statements to Detective Nolan should have been suppressed under Alaska Evidence Rule 412. But James did not make this argument below and it is therefore not before us on appeal.[23] Nor do we believe there is any merit to this claim, given that Rule 412 merely codifies existing case law regarding *Miranda* violations.[24]

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[22] *Romo v. Anchorage*, 697 P.2d 1065, 1068 (Alaska App. 1985) (quoting *Waring v. State*, 670 P.2d 357, 363 (Alaska 1983)).

[23] Moreau v. State, 588 P.2d 275, 280 (Alaska 1978).

[24] *See* Alaska Evid. R. 412; *see also State v. Batts*, 195 P.3d 144, 157-58 (Alaska App. 2008); *McGraw v. State*, 2015 WL 5000516, at *6 (Alaska App. Aug. 19, 2015) (unpublished).

Why we conclude that the court erred in admitting the children's interviews under the first complaint doctrine but that the error was nevertheless harmless

After admitting A.J.'s letter to her mother and R.J.'s statements to A.J. as "first complaint" evidence, the trial court also allowed the State to play the video recordings of the Stevie's Place interviews of A.J. and R.J., reasoning that they were also "first complaints" because this was the first time that the girls gave a "detailed report" of the abuse.

James argues that the trial court erred in admitting these videotaped interviews under the first complaint doctrine. We agree that this was error.

The first complaint doctrine permits the introduction of evidence of a victim's first report of sexual assault on the theory that such evidence "is necessary to counteract the inference ... that the victim said nothing at the time, and (thus) ... nothing happened."[25] It is admitted solely to corroborate a victim's testimony.[26]

Here, A.J.'s first report of sexual abuse was her letter to her mother, and R.J.'s was her disclosure to A.J. It was error to expand the first complaint doctrine to admit the later formal interviews under the reasoning that those interviews were "more detailed" than the first reports.

However, this error was harmless because James essentially conceded most of the criminal conduct in this case — other than the allegations involving penetration. Moreover, the most relevant portions of the videotaped statements (including the portions discussing the alleged penetration) were otherwise admissible either as prior

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[25] *Borchgrevink v. State*, 239 P.3d 410, 417 (Alaska App. 2010) (quoting *Nitz v. State*, 720 P.2d 55, 62 (Alaska App. 1986)) (internal quotation marks omitted); *see also Greenway v. State*, 626 P.2d 1060, 1060 (Alaska 1980) ("[S]tatements concerning the crime of rape or sexual assault, shortly after the commission of the act are admissible as a recognized exception to the hearsay rule[.]").

[26] *Id.*

inconsistent statements or as prior consistent statements made before a claimed motive to fabricate.

Under Evidence Rule 801(d)(1)(A), a statement is admissible as a prior inconsistent statement if the witness testifies and the prior statement is "inconsistent with the declarant's testimony."[27] Inconsistency is not limited to "textual conflict[,]" and a statement is considered inconsistent when the witness "cannot remember the event that the statement describes," provided that the declarant is given an opportunity to explain or deny the statement.[28]

Here, R.J. testified at trial that she could not remember very many details of the sexual abuse, including when the charged instances of sexual abuse occurred. These portions of her interview therefore could have been admitted as prior inconsistent statements under Rule 801(d)(1)(A).

Likewise, under Evidence Rule 801(d)(1)(B), a prior consistent statement is admissible if a witness is impeached with an alleged motive to fabricate and the witness has made a prior consistent statement that predates the alleged motive to fabricate; that is, the prior consistent statement is admissible if it is consistent with the witness's trial testimony and rebuts the implied charge of recent fabrication.[29]

Here, James's attorney attacked A.J.'s anticipated trial testimony during his opening statement and claimed that A.J. had fabricated the allegation of sexual penetration *after* she moved to Montana and *after* Detective Nolan had become involved in the case. But in her recorded interview at Stevie's Place, made before Detective Nolan had been assigned to the case, A.J. said that she once felt James's hand inside her. This

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[27] *Leopold v. State*, 278 P.3d 286, 292 (Alaska App. 2012).

[28] *Id.* (quoting *Vaska v. State*, 135 P.3d 1011, 1015 (Alaska 2006)).

[29] *Nitz*, 720 P.2d at 64.

portion of A.J.'s interview was therefore admissible as a prior consistent statement under Rule 801(d)(1)(B).

(On appeal, the State argues that the videotaped statements were admissible under Evidence Rule 801(d)(3), the hearsay exception for recorded statements of child victims of crime. But, as we recently explained in *Augustine v. State*, to be admissible under Rule 801(d)(3), the trial judge must find, *inter alia*, that the statement was acquired in a manner that avoided "undue influence" on the victim and that the statement is "sufficiently reliable and trustworthy" to establish that "the interests of justice are best served by admitting the recording into evidence."[30] Here, the State did not seek to introduce this evidence under this exception and the trial judge therefore made no such affirmative findings.)

Why we conclude that the trial court erred in failing to give a factual unanimity instruction but that the error was harmless beyond a reasonable doubt given the way this case was argued to the jury

Near the end of trial, James's attorney requested that the jury be given a factual unanimity instruction — that is, an instruction that informed the jury that, to convict on any particular count, the jury had to be unanimous as to the act on which it reached its verdict.[31] The defense attorney proposed three such instructions. For reasons that are not clear from the record, the prosecutor objected to the instructions and the trial judge refused to give any factual unanimity instruction.

This was error. As this Court has repeatedly emphasized, factual unanimity instructions are necessary whenever the State charges a defendant with multiple counts

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[30] *Augustine v. State*, 355 P.3d 573, 585 (Alaska App. 2015).

[31] *See Covington v. State*, 703 P.2d 436, 440 (Alaska App. 1985).

and presents evidence of numerous separate criminal acts if it is not readily apparent that each count is associated with a specific incident described in the evidence.[32]

In the present case, however, we conclude that the failure to give a factual unanimity instruction was harmless beyond a reasonable doubt.[33] Here, James directly conceded his guilt of all the second-degree sexual abuse of a minor charges. Because James did not dispute these charges, there was no reasonable possibility that a factual unanimity instruction would have resulted in a different verdict on those charges.[34]

James *did* dispute the charges of sexual penetration; he claimed that all of his actions involved only sexual touching. But James's claim that he had never penetrated A.J. was based on his own non-legal definition of penetration, rather than the legal definition of penetration. Under Alaska law, "sexual penetration" includes the "intrusion, however slight, of an object or any part of a person's body into the genital or anal opening of another person's body."[35] As the prosecutor correctly pointed out to the jury, James admitted to Detective Nolan that his finger went between the "lips" of A.J.'s

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[32] *Id*.; *see also Khan v. State*, 278 P.3d 893 (Alaska 2012); *Ramsey v. State*, 355 P.3d 601, 601-02 (Alaska App. 2015); *Anderson v. State*, 289 P.3d 1, 4 (Alaska App. 2012); *Castillo v. State*, 821 P.2d 133, 137 (Alaska App. 1991).

[33] *See*, *e.g.*, *Ramsey*, 355 P.3d at 602 ("[I]n cases where the defense fails to request a factual unanimity instruction, the failure to give such an instruction is plain error requiring reversal unless the State can show that the error was harmless beyond a reasonable doubt.").

[34] *See Anderson v. State*, 337 P.3d 534, 537 (Alaska App. 2014) ("[W]e may refer to the State's burden to show beyond a reasonable doubt that the verdict would have been the same, or (alternatively) we may refer to the State's burden to negate any reasonable possibility that the verdict would have been different. We mean the same thing by these phrasings.")

[35] *See* AS 11.81.900(b)(60) (defining sexual penetration as "genital intercourse, anal intercourse, *or an intrusion, however slight, of an object or any part of a person's body into the genital or anal opening of another person's body*.") (emphasis added); *see also Johnson v. State*, 328 P.3d 77, 87 (Alaska 2014).

vagina once and that he felt the "hole" of A.J.'s vagina. This was an admission of sexual penetration as that term is defined under Alaska law.[36]

At trial, A.J. testified that she told Detective Nolan that James had touched her inside "at least three times," and A.J. testified to two distinct instances when this occurred — once at the house off of Chena Hot Springs Road and once at her mother's apartment on Turner Road. The fact that the jury subsequently convicted James of two counts of first-degree sexual abuse of a minor shows that the jury rejected James's claim that he only went between the lips of A.J.'s vagina once. Given this record, we conclude that there is no reasonable possibility that a factual unanimity instruction would have altered the outcome of James's trial.[37]

Why we conclude that the trial court did not err in declining to refer James's case to the statewide three-judge panel

At sentencing, James asked the judge to refer his case to the statewide three-judge sentencing panel to consider non-statutory mitigating factors, such as the fact that he voluntarily removed himself from his victims' home before he was formally accused, and that he fully cooperated with the police investigation of his crimes.[38] The trial judge denied this motion. James does not renew his arguments concerning non-statutory mitigating factors on appeal; nor does he renew his arguments regarding any statutory mitigating factors. Instead he argues only that his case should be remanded for resentencing under the standard set forth in *Collins v. State*.[39]

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[36] *Id.*

[37] *See Anderson*, 337 P.3d 537.

[38] *See* AS 12.55.165; AS 12.55.175.

[39] 287 P.3d 791, 797 (Alaska App. 2012) ("A defendant's case should be referred to the three-judge sentencing panel, for consideration of sentences outside the presumptive range,
(continued...)

We conclude that such a remand is unnecessary. First, it is not clear what legal effect should be attributed to our decision in *Collins*, given the Alaska Legislature's subsequent repudiation of *Collins* and explicit adoption of the *Collins* dissent.[40] Second, even if there are aspects of the *Collins* decision that continue to have legal force, they do not warrant referral to the three-judge panel in this particular case.

Here, the trial court found that James's rehabilitative prospects were "guarded" because James had not "really accepted ... responsibility for this crime that he preyed upon children in his trust." The trial court noted, among other things, that James seemed to believe that the children had "enjoyed the sexual penetration and contact," and James had not produced any evidence indicating that he would be amenable and receptive to sex offender treatment.

Having independently reviewed the sentencing record, we conclude that the superior court's decision not to refer the case to the three-judge sentencing panel was not clearly mistaken.

Conclusion

The superior court's judgment is AFFIRMED.

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[39] (...continued)
if the defendant shows, by clear and convincing evidence, that the legislature's assumptions do not apply to him[.]").

[40] *See* AS 12.55.165(c), *as amended by* ch. 43, § 1, SLA 2013.